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IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

REGENTS OF THE UNIVERSITY OF MICHIGAN,
Petitioner,

v.

SCOTT E. EWING,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS AS AMICUS CURIAE

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BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS AS AMICUS CURIAE

This brief is filed on behalf of the American Association of University Professors ("AAUP") with the consent of both parties.

INTEREST OF AMICUS CURIAE

This case raises issues of due process and the role of judicial review of academic decisions, subjects among the central concerns of AAUP. Founded in 1915, AAUP is the nation's oldest and largest organization dedicated exclusively to advancing the interests of professors and research scholars in all academic disciplines. Vigilant in the defense of academic freedom, AAUP has frequently participated in this Court and in the lower courts in cases

raising First Amendment and due process questions,[1] and has on several occasions spoken directly to matters of judicial deference in the resolution of academic litigation.[2]

One of the Association's central functions, frequently undertaken in collaboration with other higher education organizations, is the formulation of national standards for the protection of academic freedom and other important aspects of university life.[3] Several AAUP-supported statements bear on the instant case. The 1967 *Joint Statement on Rights and Freedoms of Students* was formulated jointly by AAUP, the United States National Student Association, the Association of American Colleges, the National Association of Student Personnel Administrators, and the National Association of Women Deans and Counselors. Each organization endorsed the *Joint Statement* as have many other professional bodies.[4] The *Joint Statement* provides in pertinent part:

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[1] *E.g., Board of Educ. of the City of Oklahoma City v. National Gay Task Force,* 105 S. Ct. 1858 (1985); *Minnesota State Bd. for Community Colleges v. Knight,* 104 S. Ct. 1058 (1984); *Board of Educ. v. Vail,* 104 S. Ct. 2144 (1984); *Perry v. Sindermann,* 408 U.S. 593 (1972); *Board of Regents v. Roth,* 408 U.S. 564 (1972); *Whitehill v. Elkins,* 389 U.S. 54 (1967); *Keyishian v. Board of Regents,* 385 U.S. 589 (1967).

[2] *Princeton University v. Schmid,* 455 U.S. 100 (1982); *Gray v. Board of Higher Educ.,* 692 F.2d 901 (2d Cir. 1982); *Kunda v. Muhlenberg College,* 621 F.2d 532 (3rd Cir. 1980).

[3] *See* 1940 *Statement of Principles on Academic Freedom and Tenure,* reprinted in AAUP POLICY DOCUMENTS AND REPORTS (1984) and cited, *inter alia,* in *Tilton v. Richardson,* 403 U.S. 672 (1971); *Jimenez v. Aldovar,* 650 F.2d 363 (1st Cir. 1981); *Adamian v. Jacobsen,* 523 F.2d 929 (9th Cir. 1975).

[4] Several cases stemming from campus disturbances of the late 1960s relied in part on the *Joint Statement. Stricklin v. Regents of University of Wisconsin,* 297 F. Supp. 416, 420 (W.D. Wisc. 1969); *Soglin v. Kauffman,* 295 F. Supp. 978 (W.D. Wisc. 1968); *Marzette v. McPhee,* 294 F. Supp. 562 (W.D. Wisc. 1968).

IN THE CLASSROOM

The professor in the classroom and in conference should encourage free discussion, inquiry, and expression. Student performance should be evaluated solely on an academic basis, not on opinions or conduct in matters unrelated to academic standards.

A. *Protection of Freedom of Expression*

Students should be free to take reasoned exception to the data or views offered in any course of study and to reserve judgment about matters of opinion, but they are responsible for learning the content of any course of study for which they are enrolled.

B. *Protection against Improper Academic Evaluation*

Students should have protection through orderly procedures against prejudiced or capricious academic evaluation. At the same time, they are responsible for maintaining standards of academic performance established for each course in which they are enrolled.[5]

We suggest below a standard for judicial review of decisions involving the academic standing of students that gives due consideration both to the student's right to be free from prejudiced or capricious evaluation and to the unique competence of professors in judging the academic progress of their students.

AAUP is also a co-sponsor of the *Statement on Government of Colleges and Universities,*[6] formulated in 1966 by AAUP, the American Council on Education, and the Association of Governing Boards of Universities and Colleges. The *Statement on Government* recognizes the primacy of the faculty role in such fundamental areas as

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[5] AAUP POLICY DOCUMENTS AND REPORTS 141, 142 (1984).

[6] *Id.* 105.

"curriculum, subject matter and methods of instruction, . . . and those aspects of student life which relate to the educational process." [7] It goes on to indicate that:

> [t]he faculty sets the requirements for the degrees offered in course, determines when the requirements have been met, and authorizes the president and board to grant the degrees thus achieved.

Finally, AAUP's 1966 *Statement on Professional Ethics* stresses the professor's responsibility "to assure that his evaluation of students reflects their true merit." [8] By virtue of its long-standing concern with matters of academic freedom, faculty responsibility, and student rights, AAUP believes it is uniquely situated to address the Court as *amicus curiae.*

SUMMARY OF ARGUMENT

The second question presented for review by the petition for writ of certiorari in this case asks whether, in light of *Board of Curators, University of Missouri v. Horowitz*, 435 U.S. 70 (1978), the dismissal of a student from a state medical school for academic deficiencies may "be subjected to substantive due process review and reversal by the federal courts without any regard for the faculty's special expertise." [9] The petition asserts that no substantive due process should be accorded to disputes over student academic standing; then assuming *arguendo* the existence of such review, the petition goes on to argue that faculty judgments are entitled to deference from the courts. Petition for Writ of Certiorari at 15-22. Amicus AAUP submits that the substantive due process protections of the Fourteenth Amendment extend to the academic dismissal of state college and university students. In exercising substantive review, the courts should accord great, but not total, deference to the judgment of faculty members.

[7] *Id.* at 109.

[8] *Id.* at 133.

[9] Amicus AAUP confines its discussion to the second question presented for review and does not address the Eleventh Amendment issues.

Substantive due process review of student academic standing can be undertaken by the courts without excessive interference in the affairs of academic institutions, contrary to the dictum in *Board of Curators, University of Missouri v. Horowitz*, 435 U.S. 78 (1978). In *Youngberg v. Romeo*, 457 U.S. 307 (1982), the Court articulated a standard of substantive due process review that accords great deference to the professional judgments of responsible officials and avoids unnecessary intrusion into the affairs of specialized state institutions. While the setting in *Youngberg* was a mental institution, its holding is fully applicable to higher education. *Youngberg* teaches that the decision of a professional abridging a constitutionally protected interest occasions liability only when the decision "is such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Id.* at 323. The academic evaluation of students can readily be assessed under this standard. If the exercise of faculty judgment about a student's academic progress falls within generally accepted professional standards, no liability arises. Only in the rare instance where a rational professional basis is lacking for the the academic evaluation of a student should the courts intervene. See *Cafeteria Workers Union, Local 473 v. McElroy*, 367 U.S. 886 (1961). No trial *de novo* would be required to examine in detail the student's performance. The Fourteenth Amendment requires only that the institution articulate a sound academic reason for its dismissal of the student. *Dunlop v. Bachowski*, 421 U.S. 560 (1975). *See Ponte v. Real*, 53 U.S.L.W. 4539 (U.S. May 21, 1985). With the court's role confined to examination of the institution's statement of reasons, appropriate deference to academic decision-making is preserved.

In view of the yet unsettled factual disputes in this case, amicus AAUP urges the Court to announce the standard of substantive due process review for student academic standing discussed herein, and to remand the case for application of the standard by the lower courts. *See, e.g., Healy v. James*, 408 U.S. 169 (1972).

ARGUMENT

I. THE FOURTEENTH AMENDMENT REQUIRES SUBSTANTIVE DUE PROCESS REVIEW OF STUDENT ACADEMIC STANDING UNDER AN ARBITRARY AND CAPRICIOUS TEST

The instant case provides an opportunity to re-examine the suggestion made in dictum in *Board of Curators, University of Missouri v. Horowitz*, 435 U.S. 78, 91-92 (1978), that substantive due process review may not extend to the dismissal of students from public colleges and universities on academic grounds. In *Horowitz*, the Court assumed *arguendo* the existence of substantive review and concluded that no showing of arbitrariness or capriciousness had been made.[10] The reluctance to recognize substantive due process review rested on the premise that "[c]ourts are particularly ill-equipped to evaluate academic performance." Id. at 92. Substantive review for disciplinary dismissals is available, but the *Horowitz* dictum suggests that academic judgments are not susceptible to substantive judicial examination. Apart from the difficulty of differentiating dismissals on disciplinary grounds from those on academic grounds in many cases, mechanisms do exist for effective substantive due process review to correct the rare instances in which dismissals on allegedly academic grounds are in fact based on discrimination, ill will, or arbitrary action. Many lower

[10] Separate opinions by Justice Marshall and Justice Blackmun joined by Justice Brennan suggested that the question of substantive due process violation should have been remanded for consideration in the first instance by the court of appeals.

courts have been prepared even after *Horowitz* to safeguard students' interests where necessary through limited inquiry into the appropriateness of decisions concerning academic standing.[11] More significantly, decisions of this Court affirming the existence of substantive review in analogous settings compel the recognition of such review in disputes over student standing. We turn to these cases following a discussion of student and institutional interests.

Most assessment of students is conducted in a conscientious manner by faculty members. Examinations are constructed and graded with care, consistent with the tradition of objectivity and fairness which is deeply ingrained in the academic profession. As *Horowitz* and the instant case both illustrate, systematic counseling and internal grievance procedures are commonly available. From the student's perspective, grades can provide a measure of progress valuable to the intrinsic process of learning. Access to graduate education and to attractive employment opportunities often turns on academic performance. The noted scholar Edward Shils has observed:

> Students must not only be taught. They must also be assessed and they must be assessed fairly by their examiners. The assessment is important because it affects the students' chances in their subsequent studies and in admission to their professional careers.

[11] *Aubuchon v. Olson*, 467 F. Supp. 568, 572 (E.D. Mo. 1979); *Watson v. Univ. of So. Alabama Coll. of Medicine*, 436 F. Supp. 720, 727 (S.D. Ala. 1979). *See Hines v. Rinker*, 667 F.2d 699, 703 (8th Cir. 1981); *Stevens v. Hunt*, 646 F.2d 1168, 1170 (6th Cir. 1981). *But see Lavash v. Kountze*, 473 F. Supp. 868 (D. Mass.), *aff'd* 604 F.2d 103 (1st Cir. 1979); *Hubbard v. John Tyler Community College*, 455 F. Supp. 753 (E.D. Va. 1978). *See generally* R. Dessem, *Board of Curators of the University of Missouri v. Horowitz: Academic versus Judicial Expertise*, 39 OHIO ST. L.J. 476 (1978); D. Henderson, *The Law and Academic Evaluation and Dismissal in Higher Education*, 13 CUM. L. REV. 475 (1983); Note, *Judicial Review of the University-Student Relationship: Expulsion and Governance*, 26 STAN. L. REV. 95 (1973).

> Assessment also affects the students' attitude towards their studies and towards themselves. Just assessment is as necessary for society as it is for the individual student.[12]

While society has an interest in just evaluation of students, it also has an interest, long recognized in this Court, in preventing infringements on academic freedom. As Justice Powell observed in *Bakke*, the freedom of a university to make its own judgments as to education includes "the selection of its student body." [13] This principle follows from Justice Frankfurter's frequently cited reference to the "four essential freedoms" of the university, among them the right to determine "who may be admitted to study." [14] The right to decide on admissions surely subsumes the right to assess the continuing fitness of students for matriculation.[15] Such academic judgments are grounded on the special competence of faculty members in their disciplines and in evaluating student performance. While abuses in grading are rare and while academic decisions merit protection from excessive

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[12] E. Shils, THE ACADEMIC ETHIC 48 (1983).

[13] *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978). M. Finkin, *On "Institutional" Academic Freedom*, 61 TEX. L. REV. 817 (1983).

[14] *Regents of the University of California v. Bakke, supra*, 438 U.S. 265, 312, quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

[15] An early report by an AAUP committee observed:

> The question of the Retention and Promotion of Undergraduates is directly and intimately related to that of selection for admission. So intimate is the relation that, were it possible to achieve a method of selective admission which should serve as a perfect prognostic of later performance, the question of retention and promotion would no longer trouble us. But such infallibility of prediction can never be attained; for human nature does not always fulfill its early promise.

Committee G Report, *The Selection, Retention, and Promotion of Undergraduates*, 12 AAUP BULL. 370, 472 (Oct. 1926).

judicial intrusion, the possibility for abuse in student assessment remains. We submit that the Fourteenth Amendment requires the courts to maintain a limited role in substantive due process review.

Were a faculty member motivated by racial animus to fail all minority students in a class, substantive review would surely be available. Similarly, the professor retaliating against students for the exercise of their First Amendment rights would be accountable for the constitutional violation. The dictum in *Horowitz* cannot conceivably be extended to foreclose review in these circumstances. Even in *Cafeteria Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 898 (1961), where at issue was access by a short order cook to a job in a military installation, the Court confirmed that discriminatory or arbitrary government action will not be tolerated:

> We may assume that Rachel Brawner could not constitutionally have been excluded from the Gun Factory if the announced grounds for her exclusion had been patently arbitrary or discriminatory—that she could not have been kept out because she was a Democrat or a Methodist.

Surely students are deserving of at least as much protection and *Horowitz* should not be read to the contrary.[16]

What of the case in which a faculty member, asserting the meaninglessness of grades, randomly fails half of the students in a class? Such a situation presents neither discrimination nor ill will, but rather a standard of assessment that is manifestly unjust to the students directly affected. *Cafeteria Workers* suggests that relief from such arbitrary action is available, a conclusion also to be drawn from the more recent case of *Youngberg v. Romeo*, 457 U.S. 307 (1982). In *Youngberg* the Court analyzed the substantive due process rights of involun-

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[16] We discuss in Part II the requirement that reasons be articulated to explain the adverse action.

tarily-committed mentally retarded persons under the Fourteenth Amendment to the Constitution. Finding protectible interests, including the right to safe conditions and freedom from bodily restraint,[17] the Court addressed at length the standards for scrutinizing the substance of decisions interfering with those interests. The Court, balancing the needs of mental patients against the state's interest in autonomy and the limits of its resources, repeatedly stressed the deference owed to the professional judgments of those charged with the care of the mentally retarded.[18] Acknowledging the need for some substantive due process review, the Court articulated the standard of deference to be accorded to professional judgments. *Youngberg* suggested that this deference minimized judicial interference in the professional practices of the institutions in question, a consideration no less applicable to institutions of higher learning. The Court stated:

> For these reasons, the decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision of the professional is such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.

Id. at 323. This, then, answers the hypothetical case of the professor who refuses to recognize the validity of any grading system. The marks assigned by such a professor

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[17] The petition for writ of certiorari in the instant case does not appear to challenge the court of appeals' conclusion that Ewing had a constitutionally protected property interest in continuing his medical education. The due process question presented for this Court's consideration concerns only the nature of substantive review of student academic standing.

[18] *See Pacific States Box & Basket Co. v. White,* 296 U.S. 176 (1935) (on deference to administrative agencies.)

would not be based on exercise of professional judgment [19] within the limits of generally accepted professional standards. Despite the manifest differences between mental patients and medical students, *Youngberg* also states the proper standard for resolution of disputes over student academic standing. A faculty determination about academic standing is presumptively valid. The presumption may be overcome only if the faculty decision is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the decision was not grounded on the exercise of professorial discretion.[20] *Youngberg* stands for the proposition that substantive due process review may be undertaken to protect students from arbitrary injury to their academic standing, without excessive intrusion into the affairs of state colleges and universities. We turn next to the court's role in examining the statement of reasons offered by the institution for the adverse action taken against the student.

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[19] The complaint concerning grading that is most frequently brought to AAUP by faculty members involves the unilateral alteration by an administrator at the institution of a grade determined by the course instructor. Under *Youngberg,* one might argue that the administrator lacks requisite professional competence in grading students in the particular course. Indeed, AAUP standards acknowledge the primacy of the faculty role in grading. *See* page 4 *supra.* While not at issue in the instant case, we note that the concept of judicial deference to academic judgments is grounded on the special competence of faculty members in their substantive areas. Unilateral administrative alteration of a grade attenuates the basis for judicial deference to academic decisions. *See San Diego Community College Teachers Ass'n v. Governing Bd. of the San Diego Community College Dist.,* No. 492817 (Calif. Superior Ct., San Diego, Dec. 21, 1982) (grade unilaterally changed by administration restored to grade originally determined by faculty member).

[20] As described above in the section on the interest of amicus, AAUP plays a dominant role in the development of such standards.

II. SUBSTANTIVE DUE PROCESS IS SATISFIED IF THE INSTITUTION ARTICULATES A SOUND ACADEMIC REASON FOR ITS DISMISSAL OF THE STUDENT

The limited substantive due process review which we urge for student complaints over loss of academic standing requires only that the institution articulate a sound academic reason for the adverse action taken. No exhaustive trial de novo, or scrutiny by the courts of examination papers and the like, would be necessary. The institution's obligation to explain its action flows from several decisions of this Court and need not infringe academic freedom.[21]

Youngberg v. Romeo, supra, 367 U.S. 886 (1961), strongly implies an obligation to provide reasons, without which one could not determine whether the action fell within the bounds of the exercise of professional discretion.[22] In *Cafeteria Workers v. McElroy, supra*, 367 U.S. 886 (1961), the Court looked to the explanation "announced" by the government and found it facially legitimate. With respect to penal institutions, the Fourteenth Amendment requires prison officials to explain why they refused to allow an inmate facing disciplinary charges to call certain witnesses. *Ponte v. Real*, 53 U.S.L.W. 4549 (U.S. May 21, 1985). A comprehensive discussion of the obligation to provide reasons appears in *Dunlop v. Bachowski*, 421 U.S. 560 (1975). *Dunlop* addressed the scope of review under the Administrative Procedure Act of a decision by the Secretary of Labor not to file a civil action for redress of a union's alleged violations of the Labor-Management Reporting and Disclosure Act (LMRDA). The Secretary had exclusive authority to file suit to set aside improper union elections; a union member dissatisfied with the Secretary's decision not to pursue a complaint of election illegality to litigation filed suit against the Secretary. The Court first examined whether judicial review of the Secretary's decision was available at all. Finding no Congressional intent in the LMRDA to prohibit such review entirely, the Court concluded that only review with a narrow and limited scope would comport with the objectives of the statute. The LMRDA enforcement mechanisms rely heavily on the Secretary's special expertise in union matters, an expertise not shared by the judicial branch. The Court drew two basic conclusions about the situation:

> (1) since the statute relies upon the special knowledge and discretion of the Secretary for the determination of both the probable violation and the probable effect, clearly the reviewing court is not authorized to substitute its judgment for the decision of the Secretary not to bring suit; (2) therefore, to enable the reviewing court intelligently to review the Secretary's determination, the Secretary must provide . . . a statement of reasons supporting his determination.

421 U.S. 571. These principles are readily transferable to the instant case, as courts lack the expertise required to evaluate students. A limited form of review may be undertaken based upon a statement of reasons for the action furnished by the institution. The reasons are entitled to great deference, as explained in *Youngberg*, 457 U.S. 307, provided that the action was based on the reasonable exercise of academic judgment. In *Dunlop*, the reviewing court's role was described in similar terms:

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[21] *See generally* R. Rabin, *Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement*, 44 U. CHI. L. REV. 60 (1976). *See also* M. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 507 (1985); T. M. Scanlon, *Due Process*, in J. Pennock, ed., DUE PROCESS, NOMOS XVIII 93, 97 (1977).

[22] The 1966 *Statement on Government of Colleges and Universities*, quoted *supra* at 4, recognizes the professional role of faculty in determining students' progress in meeting the requirements for degrees, which are also to be set by the faculty.

> Except in what must be the rare case, the court's review should be confined to examination of the "reasons" statement, and the determination whether the statement, without more, evinces that the Secretary's decision is so irrational as to constitute the decision arbitrary and capricious.

421 U.S. at 572-3. The Court's description of the "rare case" justifying more extensive review included situations where the Secretary completely abrogated his enforcement authority, acted in a constitutionally discriminatory manner, or reached a decision clearly in defiance of his responsibilities. *Id.* at 575. In each of these circumstances the Secretary's reasons would also have failed under the *Youngberg* standard, as the justification would have been based on something other than the exercise of the Secretary's professional discretion. Floodgates of litigation over the academic assessment of students will not be opened under such a stringent standard of review. Rare will be the situation in which a student can show that the adverse academic decision did not rest upon some reasonable exercise of professional discretion but rather lacked any rational foundation.[23] But because the rare instance of serious abuse can occur, the Fourteenth Amendment requires limited judicial scrutiny of the institutional basis for the decision.

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[23] Changes in institutional policy which work to the disadvantage of students may similarly require explanation. The court of appeals focussed in the instant case on the differential treatment of respondent Ewing, which the court found unjustified. As Justice White observed in a different context in *Motor Vehicles Mfr's Ass'n of the United States Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983), "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." Ewing might argue in the instant case that the University of Michigan apparently changed its rule allowing students a second opportunity to sit for the National Board of Medical Examiners test and that no sound academic reason for the change was articulated.

Institutions may argue that the obligation to articulate sound academic reasons for student dismissals violates rights of academic freedom. Amicus AAUP, as the organization in the forefront of the defense of academic freedom, does not agree. Analogies to statement of reasons in situations of nonreappointment of faculty members are instructive. AAUP standards call for the provision of written notice of reasons for the nonrenewal of a faculty appointment, upon request of the disappointed candidate.[24] The American Council on Education, an organization representing over 1400 institutions of higher education, has similarly called for candidates for faculty advancement to have "the opportunity to know and to benefit from the deliberation of peers."[25] This requirement of providing reasons upon request was expressly endorsed in *Gray v. Board of Higher Education, City of New York*, 692 F.2d 901, 907 (2d Cir. 1982), a race discrimination action in which the confidentiality of deliberations on the nonrenewal of a faculty appointment was at issue. The court in *Gray* concluded that the provision of a statement of reasons for nonreappointment of a faculty member would appropriately inhibit capricious decision-making, and that the requirement of reasons was "consistent with the goals of academic freedom." *Id.* at 909. In commentary supporting the Association's position concerning the statement of reasons for faculty nonreappointment, a noted constitutional scholar drew an analogy to providing reasons for students grades:

> It may be a 'nuisance' to have to explain to a student the basis on which we have assessed his work as

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[24] *Statement on Procedural Standards in Faculty Dismissal Proceedings*, AAUP POLICY DOCUMENTS AND REPORTS 14, 16-8 (1984).

[25] American Council on Education, "Self-Regulation Initiatives: Guidelines for Colleges and Universities, Confidentiality of College and University Faculty Personnel Files: Its Appropriate Role in Institutional Affairs," December, 1981.

"F," but most of us have long since accepted that obligation as part of our commitment.[26]

For an institution to be called upon to offer this explanation in court need not be seen as an onerous burden or one that threatens academic freedom interests.

Apart from the sovereign immunity issues, which we do not address, the resolution of the case would seem to turn in large part on the consistency and adequacy of the explanations offered by the institution for its dismissal of respondent Ewing. The weight to be accorded to the pamphlet, "On Becoming a Doctor," construed in light of past practice, is pivotal. The court of appeals' factual finding that Ewing was "qualified" as the term is used in the pamphlet is also important. Because the courts below took markedly different positions on these questions, amicus AAUP finds the factual record quite unsettled as the case now stands in this Court. AAUP suggests that the Court adopt the standard of substantive due process review urged herein and then remand the case for clarification of the facts and application of the standard.[27] *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 584 (1947) (case should present "the underlying constitutional issues in clear-cut and concrete form"). *See Dayton Board of Education v. Brinkman*, 433 U.S. 406, 421 (1977); *Healy v. James*,

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[26] W. Van Alstyne, *Furnishing Reasons for a Decision against Reappointment: Legal Considerations*, 62 AAUP BULL. 285 (Summer, 1976). We do not mean to suggest, however, that a student challenging a single grade is entitled to the same degree of judicial scrutiny as a student challenging his dismissal from registration.

[27] We note that a court finding a substantive due process violation in the academic dismissal of a student should exercise great care in formulating a remedy. Alternatives short of ordering reinstatement should be preferred whenever possible. Remand to the institution for review by a faculty committee, modification of the student's transcript, or, as in Ewing's case, the administration of a repeat examination are among the less intrusive alternatives.

408 U.S. 169, 194 (1972); *Coleman v. Alabama*, 399 U.S. 1 (1970).

CONCLUSION

For the foregoing reasons, amicus AAUP suggests that the Court announce the standard of substantive due process review described herein for cases involving injury to student academic standing and remand the case for further proceedings.

Respectfully submitted,

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